instrument, unless in this sense—Was it ever capable of being one? But the question, Is any instrument testamentary or not? must be in every instance considered and determined as at the date of the testator's death. A testamentary instrument is always a manifestation of the testator's last will. Now, that this document was from its nature and terms capable of doing this, no one for a moment denies; it is holograph of the testator, it expresses her intention, and is quite clear in its terms. It is therefore quite capable of being a testamentary instrument, but it is a mere question whether it actually is or not, and this must be determined as at the date of the testator's death.

If she had written on the back of it "superseded" or any similar words, it would not have been a testamentary instrument to receive effect, or if any sufficient fact tending to that result and capable of being judicially established could have been ascertained, then we should have rejected it, and accordingly the question is narrowed to this, Whether the subsequent writing of 16th March caused the February writing to have no effect? Now, does the execution by her of the instrument of 16th March indicate this satisfactorily, viz., that the writing of February is not to be taken as expressive of her last will. I think with your Lordships that the later instrument is to be taken as superseding the instrument of February with respect to all the legacies mentioned in both. It is not revoking, but superseding, and that leads satisfactorily to the conclusion that the instrument of February was superseded by that of March with respect to all that is contained in that of March.

But then there is a legacy in the instrument of February which is not in that of March, and therefore the same argument does not hold; it is not superseded by a larger legacy. Is this legacy then cancelled and struck out of all the testator's testamentary writings, and are we to hold it so?

I agree with your Lordships that that is a conclusion which it would be unsafe to arrive at, and therefore I think that the instrument of February should receive effect so far as it has not been superseded by that of March.

Their Lordships therefore answered the questions as follows:—The first in the affirmative; the second in the negative; the third to the effect that her legatees who were not mentioned at all in the codicil having reference to legacy duty should have no benefit from it, and should therefore not get their legacies duty free, but that where increased legacies were given to people who were previously mentioned, their legacies were to be duty free; *quoad ultra* unnecessary to answer.

Counsel for First and Second Parties—M'Laren—Macfarlane. Agents—W. & J. Cook, W.S.

Counsel for Third Parties—Kinnear—Pearson. Agents—Mylne & Campbell, W.S.

Saturday, November 9.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

CLELAND *v.* MORRISON.

Agent and Client—Reduction by Heir of Entail of Deed granted by his Predecessor in favour of his Agent — Circumstances inferring Agency—Non-Disclosure of terms of Deed to Granter

An heir of entail in possession granted a feu-contract in favour of a law-agent, who three days after, in fulfilment of a previous arrangement, assigned half his interest in the feu to his partner S. It was held to be proved (1) that S acted in the transaction as agent for both parties, and that no independent advice was obtained on behalf of the granter, or sufficient information supplied to enable her to form a correct opinion of the value of the feu granted; (2) that at the time of granting the deed it was not disclosed to the granter that S had half the interest in the feu. *Held*, in an action of reduction of the deed at the instance of the next heir—(1) that he had a good title to sue, being in all matters connected with the entailed estate *eadem persona cum defuncto;* (2) that the agent not having disclosed that the conveyance was in his own favour, the deed fell to be reduced; (3) that even if disclosure were proved, the fact of the agent having taken a conveyance in his own favour without having obtained independent advice on behalf of his client, was of itself sufficient to justify reduction.

Entail—Result upon whole Deed, where Feu-Contract granted in terms of Entail contained one Provision contravening them.

A feu-contract granted in terms of a deed of entail conveyed a right to work stone upon a part of the estate in which feuing was prohibited. (*Opinion per cur.*) that though that provision was a contravenion, and fell to be reduced, it did not vitiate the whole deed, the two parts of the grant being distinct and separable.

In this action Matthew Dick Cleland, heir of entail in possession of the entailed estate of Springfield, near Glasgow, sought to reduce and set aside a feu-contract entered into in October 1876 between Mrs Marion Cleland, then heir in possession of the estate, and Archibald M'Lean Morrison, writer in Glasgow, the defender, by which she feued upwards of 11 acres imperial of the entailed estate, with a perpetual right of quarrying stones free of charge from the Blackmount Quarry on the estate for building on the ground feued. The grounds of reduction were three—(1) That the feu-contract was *ultra vires* of the granter as heir of entail, or at least in so far as it conferred a right to quarry stones in Blackmount Quarry; (2) that assuming the granter was entitled to grant the feu, the feu-duty stipulated for was too small, being less than was authorised in the deed of entail; and (3) that the defender and his partner were at the time when the contract was executed law-agents of the granter, and acted for both

parties ; that no independent advice was obtained on behalf of the granter, and that the consideration was inadequate, and the provisions of the deed prejudicial to the entailed estate.

The entail, which was made in 1818 by the deceased Matthew Cleland of Springfield, contained the usual prohibitions and fetters, and in particular a prohibition duly fenced against selling, alienating, or feuing, but with an exception as to certain parts of the estate in the following terms, viz. :—"Yet it shall be lawful to feu for building upon the said lands of Schoolfield, Mossend, and Muirparks only at a rate not less than 3s. sterling of yearly feu-duty per fall, and to grant feu-rights thereof only, and of what I have feued or might feu." The ground feued to the defenders was entirely situated within these excepted lands, but the quarry of Blackmount above referred to was in that part of the entailed estate in which feuing was strictly prohibited.

On the death of Matthew Cleland, the entailer, the estate had devolved upon his grand-daughter Barbara Cleland, who died on 1st April 1876. While so in possession of the estate, she, with the consent of the three persons who were then the next heirs of entail (one of whom was the present pursuer), had applied to the Court of Session in 1857, and again in 1868, for authority to feu certain portions of it, including the part called Schoolfield, the object being to enable her to grant feu-rights, not only of Schoolfield, but of other parts of it, at such a rate of feu-duty as could be procured, even although less than 3s. per fall. Under these petitions about a dozen feus were given out with the authority of the Court. In no case did the feu-duty exceed 3s. per fall, although the last feu was granted so late as 1871. In each feu-contract the feuar was authorised to quarry stones from Blackmount Quarry for building on his feu free of charge for five years.

Barbara Cleland was succeeded in the entailed estate by her sister Mrs Marion Cleland, who was the wife of her cousin James Cleland. In July or August 1876 Mrs Marion Cleland and her husband agreed to feu to the defender a considerable part of the lands of Schoolfield extending to 11 acres 1 rood and 6 2-10th poles imperial measure, "with liberty and privilege to the said Archibald M'Lean Morrison and his foresaids, in common with the feuars and vassals of the said first party, of quarrying and taking away stones from the Blackmount Quarry for the purpose of building on said plot of ground and free of charge therefor;" and the feu-contract was executed by them on 4th October 1876, and ratified by Mrs Cleland on 12th October thereafter. The feu-duty stipulated was £223, 15s., being at the rate of 3s. 1½d. per fall, payable half-yearly at Whitsunday and Martinmas by equal portions, but no feu-duty was to be payable till Whitsunday 1879, the payment then to become payable being for the half-year from Martinmas 1878. All the mines, minerals, and metals other than the stone in Blackmount Quarry were reserved to the superiors, and the defender and his successors in the feu were taken bound within two years after the term of entry (Martinmas 1876) to erect upon the ground dwelling-houses and shops having a rental of at least triple the feu-duty. But although the feu-duty did not begin to run till Martinmas 1878, and although the rents of the lands feued were assigned to the defender as from the term of entry, it was arranged by a separate agreement between the defender and Mrs Cleland, of the same date as the feu-contract, that the latter was to receive the agricultural rent, £37 per annum, for the said period of two years, and was besides to receive the value of the materials of the houses then on the property when these should be pulled down by the defender in the prosecution of his building operations. Mrs Marion Cleland died in October 1877, about six weeks after the death of her husband James Cleland, and she was succeeded in the entailed estate by the pursuer of the present action.

For many years the agent of the Cleland family had been Mr James Service senior, writer in Glasgow. He had acted for Mrs Barbara Cleland in her application to the Court for power to feu, and in the making up of her title. The defender was for a number of years in Mr Service's office. In August 1876 the defender and Mr James Service junior, son of Mr Service senior, entered into partnership as writers in Glasgow, occupying the same office, and with the same staff of clerks. Previous to that Mr Service junior had been in his father's office. Mr Service senior was then also in business as a writer, but he occupied a separate office, and had a staff of clerks of his own. Mrs Marion Cleland made up her title by special service, which was carried through by Messrs Morrison & Service or by Mr Service junior, and they also acted as her agents in other matters connected with her estate,—in particular, in letting the farm of Springfield, the lease of which bore to be written by "Robert Thomas Macmaster, clerk to A. M. Morrison & James Service junior, writers in Glasgow."

The ninth article of pursuer's condescendence was as follows—"(Cond. 9) Within a few months after Mrs Marion Cleland's succession to the entailed estate the defender conceived the design of obtaining from his said client, who was an old lady, a feu of a large and valuable part of the entailed lands, extending to 11 acres 1 rood and 6 2-10 poles imperial measure, equal to 8 acres, 3 roods and 32 1-10 falls Scotch, which are described in the summons, on grossly inadequate terms, without judicial authority being obtained, and without any independent inquiry in the interests of the heirs of entail. . . . . It is believed and averred that in pursuance of this scheme, taking advantage of his position as agent, the defender, or at least his partner James Service junior, with the defender's knowledge and approval, proposed to take a feu of the said plot professedly at a feu-duty of 3s. or thereby per fall, but really on terms not equivalent to that rate, and on conditions prejudicial to the entailed estate, which proposal nevertheless they or one or other of them falsely represented to be an advantageous offer, and full value for the land. The explanations and counter-statements in the answer are denied."

The defender's answer to this article was, *inter alia*, as follows :—"Explained that the defender proposed to Mr Cleland to take a feu of a portion of his lands at Cumbernauld, and that Mr Cleland declined this, and offered him a feu of a portion of the lands of Schoolfield. Prior to this neither Mr Service junior nor the defender had ever acted for Mrs Marion Cleland or her husband Mr James Cleland, and the defender (who neither

before or since acted for Mrs Marion Cleland or her husband at all) had not even seen Mrs Cleland for twenty years. There was little demand for feus in the neighbourhood of Schoolfield, and 3s. per fall was an ample rate of feu-duty for the ground feued."

In September 1876 the pursuer had heard of the proposed feu, and had intimated twice to the defender's firm that he objected to the transaction. He also through his agents intimated his objection to Mrs Marion Cleland herself in writing, which letter was shown by her husband to the defender. The defender in his tenth answer admitted that this letter was shown him, but averred that Mrs Cleland and her husband were satisfied with the bargain, and that it was in point of fact advantageous. The pursuer further averred that he believed his remonstrances had taken effect, and that he was unaware of the carrying through of the transaction until after Mrs Marion Cleland's death.

It was matter of admission between the parties that soon after the execution of the feu-contract the defender conveyed and assigned to his partner the said James Service junior one-half *pro indiviso* of the subjects in question.

The pursuer's nineteenth article was—"Moreover, at the date of the said feu-contract the relation of agent and client existed between the defender and Mrs Marion Cleland, and the defender was therefore personally disqualified from obtaining the said feu-contract unless he dealt at arm's length with his client, and took care that she obtained independent advice. Instead of his doing so, however, the transaction was carried through by his own firm, or at least by his partner, there being no separate agent to represent Mrs Cleland and protect her interests or those of the heirs of entail. Further, taking advantage of his position, and in violation of his duty as agent, the defender obtained the said feu on grossly inadequate terms as above specified. Moreover, he abused his position as agent on the estate in question, and as such possessed of full knowledge of the position of the ground and the feuing rights previously granted, to obtain the said feu-contract under conditions seriously prejudicial to the heirs of entail without the usual clauses relative to the formation of streets and the class of buildings to be erected." This the defender denied.

The pursuer's pleas-in-law were—"1. The said feu-contract is null and void, or at least reducible as being in violation of the deed of entail and *ultra vires* of Mrs Marion Cleland; at least it was *ultra vires* of Mrs Marion Cleland to grant the defender and his successors the right of quarrying in Blackmount quarry. 2. *Esto*, that Mrs Marion Cleland was entitled to grant a feu of the said lands at a rate of not less than 3s. per fall as a present payment, the said feu-contract was nevertheless in violation of the deed of entail and prejudicial to the interests of the heirs of entail, in respect that (1) payment of feu-duty by the defender was postponed till Whitsunday 1879, while the defender's entry was at Martinmas 1876, with right to draw the rents of the said lands from that term, (2), a right of quarrying on other parts of the entailed lands was given to the defender, and (3) by the said feu, parts of the entailed estate, and in particular the mineral field let to Messrs Dixon & Co., were cut off from the old Glasgow and Stirling road. 3. The defender was personally disqualified from obtaining a feu of the said lands from Mrs Marion Cleland, or at least he is not entitled to enforce it, in respect that (1) the relation of agent and client existed between the defender and Mrs Marion Cleland and her husband at the date of the said feu-contract and the defender's firm, or at least his partner or colleague James Service junior acted for both parties in the said feu-contract; (2) there was no independent advice obtained or inquiry made in the interests of Mrs Cleland or the heirs of entail as to the advisability and terms of the proposed feu; (3) the consideration given by the defender was to his knowledge grossly inadequate, but was represented to his said clients by him or the said James Service junior with his knowledge and approval to be a full return for the lands; and (4) the conditions of the feu-contract were to the defender's knowledge to the serious prejudice of the entailed estate."

The defender's pleas, *inter alia*, were—"(4) The feu-contract not having been *ultra vires* of the granters thereof the defender should be assoilzied. (5) The plea founded on agency is not competent to anyone but the client who alleges that his agent has wronged him, and the present pursuer has therefore no right to maintain the said plea. (6) The defender not having been Mrs Cleland's agent, the action so far as rested on that ground is untenable. *Separatim*, the contract was a fair one, in which full value was given by the defender, and regarding which Mrs Cleland had independent professional advice."

The Lord Ordinary (Curriehill) allowed a proof before answer, and the facts then brought out in regard to the execution of the feu-contract were as follows:—At the time of Mrs Barbara Cleland's death James Service senior was the agent of the family, and at first he continued nominally to be agent for Mrs Marion Cleland. But he was getting old, and very slow and dilatory in carrying through business, so Mrs M. Cleland's title, as above stated, was made up by his son, who also did other business in connection with the estate.

It appeared that the defender at that time wished some ground to feu, and Mr Cleland's name was mentioned to him by Service junior. They accordingly went to see Mr Cleland, when the three went to the ground, and it was agreed then that the defender should get the feu in question. No valuation of the ground was taken previous to this by any of the parties. A draft minute of agreement between them was prepared by Service junior, which was sent to Mr Cleland. A draft feu-contract (mostly a printed form, viz., that approved by the Court in previous applications for authority to feu) was then prepared by Mr Service senior on behalf of the Clelands, and was brought by Mr Cleland to the defender and Service junior. Instead of this being returned to Mr Service senior for revisal, a new draft was prepared by Service junior, which in several points differed from the original one, and which was not sent to Service senior, but was sent to Mr Cleland, who brought it back some days afterwards, when it was extended by Service junior's clerk Macmaster, who was there designed as "clerk to James Service junior." The drawing of the feu-contract was entered in James Service junior's books as a charge against

the Clelands, and was paid by their representatives during the currency of this action. The contract was taken out by the defender and Service junior to Bishopbriggs, where the Clelands lived, and was signed by them there, Service junior stating that it was read over to Mrs Cleland before signing. The warrant of registration on behalf of both parties was signed by Service junior. The feu-contract was ratified by Mrs Cleland on 12th October.

The feu-contract bore to be in favour of the defender only, but on 7th October, three days after the date of the contract, the defender reconveyed to Mr Service junior the half of the ground feued, it having been arranged from the beginning that they were to go halves in the transaction.

The following evidence, *inter alia*, was given by Mr Alexander, agent for the pursuer—"In consequence of instructions I received from pursuer I called on Mr Service senior and saw him. I told him that pursuer objected to a feu of a large lot of 11 acres or thereby at the minimum feu of 3s. per fall. I said that on behalf of the pursuer I was quite ready to meet with him and concur in a feuing scheme of small lots as had been done formerly at a valuation to be got at the time, and that I wished him to apply to the Court as formerly for authority. Mr Service said that he objected to the scheme, and had told James Cleland so, and that he also objected to Mr Morrison. He did not say he had told Morrison that he had objected to the scheme; but he said he had told Mr Cleland that he was averse to feuing large lots, and also to Mr Morrison. He said he intended to apply to the Court as formerly for authority to feu, and that he would desire Mr Cleland to call on him in order that they might have a consultation as to the procedure to be adopted. I had no intimation from Mr Service for some time as to this proposed meeting, and I wrote him on 19th September. A copy of the letter is produced. I got no answer. I called on Mr Service on 2d October, and he told me he had not seen Mr Cleland, but he thought I should write to Mr Cleland to come in. I accordingly wrote to Mr Cleland on the same day, but he neither called nor sent an answer. On 6th October my partner Mr John D. Taylor told me that Messrs Archibald Maclean Morrison and James Service junior had to do with the estate, that they had been advertising the ground, and that he had called upon them, when it was stated that they had the feuing of the estate. I immediately called upon Morrison and Service junior and saw them. I had a conversation with Mr Service junior in Mr Morrison's presence. Mr Morrison heard what passed, but said nothing. I told Mr Service junior just what I had said to his father, that my client objected to feuing in such a large lot as 11 acres, and that at 3s. per fall, and without going to the Court. I told him I was willing to concur in getting a valuation, and having a proper feuing of the estate in small lots as formerly. I told him also that his father at my interview with him had concurred in this. Mr Service junior replied that he was now Mrs Marion Cleland's agent, and that he would not go to the Court for leave to feu or get a valuation. (Q) Did he inform you on that occasion that a contract had been executed?—(A) He did not. All he said was, as I understood him, that he would go on."

The following evidence was given by Mr Service junior—"In the summer of 1876 Mr Morrison asked me if I knew of anyone who could feu him ground. I replied that I knew Mr James Cleland, who had ground at Blairlinn and Cumbernauld. I saw Mr Cleland in my office in July, and spoke to him on the subject. He said he would prefer to feu Springfield rather than Blairlinn. He asked me to bring out the person who wanted the feu. Defender and I went out to Springfield about the middle of July. Defender wanted ground in order to feu it to builders and others. He has been engaged in buying land and subfeuing it to a large extent. I had a share in a number of these speculations. Our practice was to take the title in name of one of us only. In the present case I had a share in the feu in question, and the title was taken in defender's name in accordance with our usual practice. That was done to simplify the matter, and I had a particular reason also, because as the deed was going to my father I did not wish him to know what speculations I was going into. When defender and I went out to Springfield we called at the house and saw Mr and Mrs Cleland. Mr Cleland, defender, and I went round the ground. Mr Cleland pointed it out to us, and stated that the price was £25 per Scotch acre. After some conversation to the effect that he would like it cheaper, defender said he would accept it at that price, and it was stated that I was to have an equal share in it. Defender stated that he wanted the ground for the purpose of subfeuing for building. I said that my chief interest was in having the preparation of the deeds in subfeuing. . . . It was arranged between Mr Cleland, defender, and me that a clean draft should be written out giving effect to the alterations, and that it should be done in my office in order that it might be done quicker. I accordingly prepared a new draft, and sent it to Mr Cleland on 22d September by previous arrangement for his approval, and to take it to my father. He called on me perhaps three days afterwards, and gave instructions that my clerk should extend it. I accordingly got it extended. The entry in my account—'to drawing feu-contract'—refers to the copying out of that draft as I have explained. *By the Court.*—I never meant that to be charged; it was merely an entry which the clerk put into the book. When I revise a draft I don't enter it in my books as drawing it, but this draft is completely rewritten. The bulk of it is in print, and all the difference was that I struck out some of the clauses which had been in my father's draft. . . . Mr Cleland was made aware in July that I was to have an interest in the transaction."

Mr Service senior was unable to give evidence from his mental and bodily condition.

John Fraser, spirit merchant in Glasgow, stated that during a conversation he had with James Cleland some days after the feu in question was granted the latter had said that he had feued the ground to Mr Service and his partner. The purport of the other evidence, so far as necessary, sufficiently appears from the opinions *infra*.

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—

"*Edinburgh, 28th June* 1878.—The Lord Ordinary having considered the cause, Finds that the feu-contract libelled, in so far as it confers on the defender the right, liberty, and privilege of quarry-

ing and taking away stones in Blackmount Quarry mentioned in the summons was *ultra vires* of the granter, and is reducible: Therefore reduces, decerns, and declares in terms of the alternative reductive conclusion of the summons, and grants warrant to the Keeper of the General Register of Sasines to mark upon said register that decree of reduction of the deeds libelled has been pronounced to the extent aforesaid, and decerns: *Quoad ultra* assoilzies the defender from the conclusions of the action, and decerns," &c.

His Lordship added a note, which contained, *inter alia*, the following—(1) As to the feu-contract being *ultra vires* of the deed of entail:—"The first question to be considered is, Whether the feu-right thus granted to the defender by Mrs Marion Cleland was *ultra vires* of her as heir of entail in possession of the estate of Springfield? I need hardly say that an heir of entail is fiar of the entailed estate and has all the powers of a fee-simple proprietor except in so far as fettered or limited by the deed of entail. In the present case, although the heirs of entail were prohibited from granting feus of the estate generally, the prohibition was relaxed as regards Schoolfield, Moss End, and Muir Parks, which they were expressly authorised to feu subject to the conditions, first, that the feus should be for building purposes, and second, that the rate of feu-duty should not be less than 3s. per fall. Mrs Marion Cleland therefore was as fully entitled to feu these lands for building purposes as she would have been had she been fee-simple proprietrix, provided only the feu-duty was not less than the rate specified in the deed of entail; and in granting such feu-rights of those parts of the estate she was not bound to stipulate for any higher rate of feu-duty, or to consult the interest of the next heirs of entail. Such being her powers under the entail, the first question under this branch of the case is whether in the feu-contract into which she entered with the defender, she exceeded these powers? As regards the privilege of taking an unlimited quantity of stones for an unlimited period from Black Mount quarry free of charge, for the purpose of erecting buildings on the eleven acres feued to the defender I am very clearly of opinion that the contract was *ultra vires* of Mrs Marion Cleland as heir of entail. The grant of the quarry was a gratuitous alienation of a part of the entailed estate which she had no authority to make under the deed of entail, and for which she had not obtained the authority of the Court of Session. The privilege of quarrying is a valuable one to the feuar, as it is proved that in the event of his proceeding regularly with building upon the eleven acres for a continuous period of years, the saving in cartage and tolls would be at the least £135 per annum. That sum would probably greatly exceed any lordship or rent which even a feuar would pay for liberty to quarry stones; but still there cannot be a doubt that the privilege would have been of some annual value to the estate, whereas it is here given free of charge. I am therefore of opinion that, in so far as the right of quarrying in Black Mount is concerned, the feu-contract is bad and reducible.

"The next question that arises on this branch of the case is, whether the part of the contract relating to the quarry being bad, the contract is separable, and may be reduced in part, or whether the invalidity of this one branch of the contract vitiates the whole? Several cases have occurred in which where a contract has been made by an heir of entail to the prejudice of succeeding heirs, either by stipulating for too low a rent or for too long a duration of the lease, the Court has refused to interpose to reform the contract, and has set it aside altogether, as was done in the Durris cases—*Gordon* v. *Innes*, 2 Sh. p. 28; *Mordaunt* v. *Innes*, 9th March 1819, F.C. But in the present case the circumstances are entirely different. The heir of entail has granted a feu-right of part of the entailed estate which she had full power to feu,—and she has also in the same deed gratuitously alienated a different part of the estate which she had no power to give away. These two parts of the grant appear to me to be distinct and separable. The pursuer, indeed, has an alternative conclusion, to the effect that the contract should be set aside in so far as the quarry is concerned, and the defender, so far as I understand, does not maintain that if he is deprived of the quarry he is entitled to throw up the whole contract or to have the feu-duty modified. I therefore think that the pursuer is entitled to the decree of partial reduction which he seeks."

His Lordship then went on to state his reasons for holding that the feu-duty could not be held to be less than 3s. a fall, which it was maintained it was, because it was not to be paid for two years. The reasons were—(1) the whole ground was feued, the feu-duty being payable for every inch of the ground without deduction for roads, &c.; (2) it was within the power of the granter in the fair administration of the estate to give two years' immunity from feu-duty at the commencement of a contract which contemplated the erection of a large quantity of building; (3) the granter and her successors were to receive the agricultural rents till the feu-duty was paid.

His Lordship further proceeded to state that if the feu-duty required by the deed of entail had been procured, the feu-contract could not be challenged by the pursuer or any subsequent heir of entail merely on the ground that a higher rate could have been obtained.

On the second ground of reduction, his Lordship found that there was no reason to suppose that the feu-contract drawn by Service junior was not submitted to Service senior, and revised by him, but that after that the carrying through of the contract was entrusted to Service junior; that Service junior had disclosed to the Clelands previously to the transaction that he and the defender were jointly interested, and that therefore the law of *M'Pherson's Trustees* v. *Watt*—December 3, 1877, 5 R. 9—did not apply. Finally, that the transaction was a fair one, and that Mr and Mrs Cleland were proved to have been satisfied with it.

The pursuer reclaimed.

Argued for him—Service junior acted as agent for both parties, and no independent advice was had by the granter; no information was given her, and no separate valuation obtained. The grant was in favour to the extent of one-half of Service junior, and this was not disclosed to the granter, and therefore the law of *M'Pherson's Trustees* v. *Watt*, March 2, 1877, 4 R. 601, and December 3, 1877, H. of L., 5 R. 9, applied; *cf.* also *Anderson* v. *Elsworth*, June and July 1861, 3 Giffard's Reps. 154.

Argued for the respondent—Service senior had acted as agent for the Clelands, and had looked after their interest, and been consulted by them all through this transaction, although Service junior had carried it through on account of his father's age and dilatoriness. The transaction was a perfectly fair one, and the feu-duty was as much as could be got from anyone. The Clelands themselves were perfectly satisfied with their bargain. It was clearly proved that it was disclosed to the Clelands that the grant was in favour of Service junior as well as Morrison; at all events, it was not alleged on record that no disclosure was made, and it was too late now to make any amendment. The case of *M'Pherson's Trustees* v. *Watt* had suggested this ground of action to the pursuer. In regard to the law of *Watt*, a distinction must be drawn between a case where the person who transacted said "I didn't know you were the purchaser," and in consequence the deed fell; and where it was the heir of the person transacting who challenged. In the latter case prejudice must be proved. The granter of this deed homologated it, and this would have been a good defence to any action at her instance, and surely her successor in the estate could have no ground of action which she had not—*Earl of Elgin* v. *Wellwood*, June 13, 1821, 1 Shaw's App. 44; *Robertson* v. *Fleming*, March and May 1861, 4 Macq. 167.

The question arose at the discussion, whether it was relevantly averred on record that Service junior, being the agent of the Clelands at the time of the transaction, took a conveyance in his own favour without disclosing to the Clelands that he was the beneficiary. A proposal to amend the record to this effect, and to lead proof as to the fact of disclosure, was made, but this was not thought necessary.

At advising—

Lord Justice-Clerk — If the challenge of the feu-contract in this case had rested solely on the ground of the entail, I am satisfied with the Lord Ordinary's view. I do not think the transaction could be set aside as merely a contravention of the deed of entail or being *ultra vires* of the heir of entail, except as regards the quarry, which stands on a different footing from the rest. If the deed had been capable otherwise of being sustained, I do not think we should have thrown it over altogether because it contained a privilege which the granter had no power to give.

Substantially the case we have here is that a feu-contract is challenged by a person entitled to succeed to an entailed estate after the death of the last heir on the ground that it was unduly obtained from the granter by her solicitor. I entirely dissent from the proposition which was maintained in argument, that in such a question the heir of entail is a third party. The heir of entail is in some respects a third party, but he is not a third party so far as the estate to which he succeeds is affected by the deeds of his ancestor. He is subject to the obligation created over the estate by his ancestor, and he has the same liberty as the ancestor himself had to set the obligation aside on the ground of deception or otherwise. In such a case as the present the granter of the deed could have set it aside, and I think the right transmits to the heir; but the question is, Whether the challenge which has been made in this summons is one which can be sustained?

The case, as I understand, it is this, that in this transaction for a feu-contract Mrs Cleland had no independent advice that the transaction was in favour of the defender Morrison, who was in partnership with Service junior, who again acted as agent for Mrs Cleland as well as for Morrison in carrying through the business. It now turns out that Service not only acted in that capacity, but that he himself was interested to the extent of a half in the feu. There was a proposal to the effect that the record should be amended by stating that that was the fact and that it was not disclosed. I have very great doubt whether that amendment should be allowed as a specific and separate averment, or whether it is necessary. The challenge of the transaction is fairly taken on record. It was for the defender to have shown that there was a full disclosure, and I think upon the record and the evidence we are now in a position to decide the case without any further statement.

Mrs Cleland was the heiress of entail to this property, and James Service junior was a clerk with his father, a man in business in Glasgow, who had been Mrs Cleland's agent. James Service junior and the defender had been engaged in property speculation, and this feu is obtained by Morrison on the footing that he and Service junior should be each interested in it to the extent of one-half. I think the position of old Mr Service in the matter is quite clear. He no doubt did prepare a draft of the feu-contract, but it was with the view to an application to the Court for liberty to feu, and taking the evidence of Mr Alexander, I think it is clear that as far as Mr Service senior was concerned he disapproved of the whole transaction, and that he thought they should have applied to the Court. From that day forward old Mr Service does not appear in person at all—it is not proved that he revised the deeds or was ever afterwards consulted about them. On the contrary, a material fact in the evidence is that he did not approve. The deed is altered, the new draft is prepared, and old Mr Service is exchanged for young Mr Service. From that time forward all the communications are between Morrison and young Service on the one hand, and Mrs Cleland on the other, and the feu-contract is executed in the terms in which it is now expressed. I must assume that no independent agent was consulted on behalf of Mrs Cleland. Even if old Service had been her agent, I question whether it would have been enough, for this reason, that when an agent proposes to take a benefit to himself from another—he being at the time the man of business of that other party—I think he is bound to see that the other party is thoroughly protected by independent advice. I do not say that old Mr Service was not an independent adviser, but it is proved that young Mr Service was really the only agent employed in the matter. The accounts produced as taken from his books show it, and it was so stated to Mr Alexander, and these accounts have since been paid by the executors of the deceased. That being the condition of matters, I do not see that Service junior—there being no other independent agent—disclosed the fact that he was interested in the feu along with Morrison. I think he did not. There is no doubt some

evidence of conversation, not specified as to time or place or occasion, in which Mrs Cleland and Mr Cleland had been told that James Service junior had an interest, but the question is, Did he disclose the fact before the date of the deed? I find no substantial proof whatever that he made any such disclosure; on the contrary, I think I find that he purposely concealed this from his father, and if he desired it concealed from the confidential agent of Mrs Cleland he must necessarily have concealed it from the Clelands. I cannot take it off his hands that, desiring it to be concealed from the agents of the party, he communicated the fact to that party. I think that is quite sufficient of itself to show that there was no such disclosure. But apart from that altogether, it is quite enough for the decision of this case that the Clelands were left without sufficient protection in the shape of independent legal advice. I do not think it is necessary to determine whether the amount of feu-duty taken was insufficient. My impression is that it was, but what I say is this—the absence of an independent protector and adviser in the shape of a proper law-agent is quite enough for the reduction of this deed, because it it impossible to tell whether the party would have allowed this deed to be executed or not—the probabilities are that he would not. If sufficient information had been given to the Clelands, if a separate valuation and other precautions had been taken, it might have been different, but the want of these is always the reason for such cases as the present. The defender Morrison, so far from being entitled to complain of the state of the record, should rather have made a candid statement that it was quite true that Service and he were both interested in the transaction, that he was a trustee for Service, and that Service communicated with the Clelands. But not one syllable is said of this on the record. There is simplyan admission of the execution of the deed in Service's favour a few days after the date of the feu-contract. This has not been a straightforward transaction from first to last. The Clelands were left without an independent adviser, the contract was in favour of their own agent and his partner, and the fact that it was in favour of their agent was not disclosed. I am of opinion therefore that the transaction cannot stand; it was contrary to good morals and to the duty a law-agent owes to his client, and altogether bad.

About the title I do not require to go back. It is a case under the catagory of fraud, though fraud is not exactly alleged, and I have no doubt whatever that the heir succeeding is entitled to plead whatever was competent to his predecessor.

Lord Gifford—The question is, whether this feu-contract can stand in the circumstances in which it was granted? The moment it appears that an agent has been acquiring subjects from a client without the interference of an independent adviser, the deed falls to be set aside without inquiry at all as to whether any advantage was taken, because it was a violation of trust. But in the present case this involves a good many questions of fact. In the first place, it is disputed that Service junior was agent for Mrs Cleland at all; and it is further said that even if he were, that is not the case on record; but in the condescendence it is stated that Morrison and Service were carrying on partnership as law agents, and further that Mrs Marion Cleland—that is, the heir of entail in possession—employed the firm as her agents. The em ployment of the firm as agents necessarily means the employment of both partners of that firm, and therefore I take this as including the statement that Mrs Marion Cleland employed James Service junior as her agent, and that is admitted by him. No doubt she says she employed Morrison also. But we have here sufficient allegation that James Service junior was employed by Mrs Marion Cleland as her agent. Then the article goes on to say that the firm acted in carrying out her service, and in various other matters, including the letting of the farm of Springfield, and that the firm were also employed as her agents in connection with the preparation, execution, and registration of the feu-contract under reduction. I do not think that it can be doubted that she employed James Service junior. There is no doubt that the feu-contract was carried through by the firm, and that Morrison and Service junior were not only partners in business, but were partners in the feuing speculations which formed the subject-matter of the contract. The challenge of the deed seems to be good upon the record if the fact turned out to be that Morrison as agent, or Morrison and Service as agents, were the parties who carried through the deeds themselves. I cannot commend the record, for that fact ought to have come to the knowledge of the pursuer when making it up. But I do not doubt it is within the case, and if it comes out in evidence sufficiently strong to support the plea stated by the pursuer, I would have no hesitation in allowing the amendment, in terms of the Act of Parliament, to bring out in an existing action the true question between the parties.

But I concur with your Lordship that perhaps it is not necessary to cumber the record with putting on amendments and answers—the case is sufficiently disclosed, and has been sufficiently brought out by the parties at the proof. I think it is proved, in point of fact, that James Service junior was the agent of Marion Cleland in reference to this feu. He was undoubtedly the agent of Mrs Cleland in reference to her service, and in reference to various other pieces of business, and it is not very unlikely that he, being employed in these matters either for himself or partner, would also be employed in the feuing. It is no doubt true that James Service senior had been Cleland's agent, and it is also true that the original draft was filled up by him, but he appears to have done nothing more except with reference to the matter of ratification, to which I shall speak immediately. The reason why he did not not do anything more appears pretty plainly. He was an oldish man, and he was a failing man. His memory was going. He was forgetful and careless, and dilatory, and it is in evidence that the husband of the heiress of entail said that unless James—that is, the young man who had just started in business, whether in partnership with Morrison or not—did the work, he would not get it done for ever so long. He must employ the son of his old friend—the father was not fit to do it. That Service junior was employed, and that he really superseded his father in the business, I think pretty clear on the evidence. He did not adopt his father's draft of the feu-contract. He threw it aside, drew a new contract himself, and charged for the drawing of it, and

not for the revising of it. The charge for the drawing of it is in his books. He then sent that, not to his father, but to his client. If Service senior had been really the agent—the known agent as it is now stated—the draft after being revised should have been sent back to the father to be carried out. The whole case speaks distinctly for the employment of the son, and not of the father. The son sends the draft to his client, or his client's husband, and not to the opposite agent, as his father was. It was never revised by James Service senior. At least there is no proof of it. On the contrary, there is the deed of agreement, which never went to James Service senior either; and then we have what is a very important fact in the case, namely, that James Service junior, charged with the carrying out of this feu-contract, took the deed in favour of Morrison. If he had done everything above board he should have put his own name in the feu-contract as it was put into the deed afterwards. And he says the only reason why that was not done was, first, that it was the practice to take the deeds in favour of one or other, of which we have no proof except that statement; and second, that he wanted to keep the transaction secret from his father. Now, on the question of practice, I may just say that the deed is dated the 4th of October, and is not ratified till the 12th of October, whilst the deed by Morrison in favour of Service, giving Service one-half, is dated the 7th of October, within three days of the fourth, and before the first deed was ratified. Why that was a matter of convenience I cannot understand, and why it was done in this way has not been suggested. I therefore take it that upon the face of the deed it was taken to Morrison on purpose, but still that Service was a party to it. Service junior said he did not want his father to know that he was interested in the transaction. I think this was not because his father was agent, but because being Cleland's agent he would have objected to it. I think that is important. James Service junior concealed his interest in the transaction not only from his father but from the Clelands. Notwithstanding the shape of the deeds, he says he told the Clelands, and made them perfectly aware that the ground was feued to Morrison and to himself. The *onus* of proving that lay heavily upon James Service junior, and I do not think he has discharged it. No doubt it comes in incidentally that in the present case the transaction was taken in the defender's name according to the usual practice of the firm. That was done to simplify the matter, but I cannot quite see how the matter was simplified by having two deeds instead of one. Service's explanation is not very intelligible, because while he did not want his father to know that he had been engaged in speculations, he told the Clelands, apparently without any caution not to tell his father that he was interested in them, that it was Morrison who wanted the feu. He says himself—"There was some conversation to the effect that he would like it cheaper, but defender said he would accept it at that price, and it was stated that I was to have an equal share in it." I must say that I would have liked that point to have been brought out a great deal more distinctly. Then Service goes on to say to the Clelands that the defender wanted the ground for the purpose of sub-feuing, and he adds in his evidence that he also told them "my chief interest was in having the preparation of the deeds in sub-feuing."

Now, was that statement made to Mrs Cleland to put her on her guard that he who was acting as her agent was really the purchaser? I do not think the statement enough, and when we come to look for corroborative evidence I do not think there is corroboration. The deed between Morrison and Service was dated three days after the feu-contract, and was immediately put on record, and I daresay the matter would leak out then, but I do not think it is in evidence that Mrs Cleland was warned beforehand that the agent to whom she entirely trusted was himself the feuar. That is enough to cut down the deed at the instance of Mrs Cleland. No doubt she might have waived the objection and confirmed the transaction; but I do not think there is any evidence that she did so. It is a very odd thing that the transaction was kept secret from the agent of the next heir of entail.

Now, if the challenge had been brought by Cleland herself, then according to the law of the case of *Macpherson's Trustees* v. *Watt* the action would have been at an end. She would not have been required to prove anything but that she granted the feu without knowing that she was granting it to her agent. But then the difficulty arises—can the present heirs of entail take up the challenge which was competent to Mrs Cleland after her death? I think they can. I had some difficulty about this when the objection occurred to me yesterday, and I am not prepared to say that the point is free from difficulty yet, but I think he can. Mrs Cleland was acting not only for herself in the matter, but for the heirs of entail. They were to have the benefit of the feu-duty after she had done with the estate, and the heir is quite entitled to take any objection competent to her, and which she has not barred herself from taking by corroboration. I cannot hold that an heir acting under an entail like this can make a deed that would not be binding on her but binding on the heirs of succession. It was conceded that if the deed had been forged—a null deed as Mr Rhind put it—that it would have been challengeable by the heirs in succession; and I take it that the heir of entail is exactly in the same position as Mrs Cleland herself so far as the estate is concerned.

If it was doubtful that the disclosure had been made—if there was evidence that led me to believe that Service junior really told Mrs Cleland that he was the purchaser as well as agent in the case—then there would be the further question as to whether there was prejudice to the heirs of entail. I am disposed to hold, even if it had come to this, that the pursuer has sufficiently shown that a higher price might have been got for the land. It was a speculative purchase, and there is always a doubt about speculative purchases; but if there is a preponderance of probability that a larger sum might have been got, then that is sufficient. If it really came to this—as I do not think it does—I would hold that there was proof of such prejudice; but, as I have already said, I think there was concealment, and therefore without proof of prejudice, on the principle of *Macpherson's* v. *Watt*, I would cut down this deed because the agent employed by the seller to carry out the transaction took the purchase to himself without telling his client.

Lord Young—I am disposed upon consideration to concur with your Lordships in thinking that the record, proof, and argument enable us without any amendment of the record to determine in this action the real question in controversy between the parties.

The case is one of reduction, and it is directed against a feu-contract dated 4th and 11th October 1876, entered into between the defender and the pursuer's predecessor as heir of entail in possession of the estate referred to. The grounds of reduction are these—in the first place, that the feu-contract was contrary to the deed of entail in respect it granted a perpetual right of quarrying in a quarry on part of the entailed estate, and in the second, that the feu-duty was less than the deed of entail authorised to be taken, and there was no authority of the Court of Session to take less, which I understand the Court has power to give. The third and material head of reduction, and that which has occupied all our time, may I think be shortly and sufficiently expressed thus—that the feu-contract was unduly obtained by a solicitor in his own favour from his client.

With respect to the reasons of reduction founded on the entail—that is, that the deed was contradictory of the entail, and therefore, however fairly it might have been granted, it will not affect the pursuer as heir of entail—I do not find it necessary to add anything to what your Lordship has said.

I address myself entirely to the third reason of reduction, which I have represented as being of this character, that the deed was unduly obtained by a solicitor in his own favour from his client. Now the facts here are complicated, and could only be ascertained by the pursuer on investigation—some of them indeed were only ascertained by him after the action had been brought into Court. But the facts I think are clear enough now, and sufficient to enable us to decide the case upon the real question about which the parties are in controversy. The only defender is Mr Morrison, a solicitor in Glasgow. It is averred, and he admits, that from August 1876 until February 1878 he and Mr James Service junior were in partnership as solicitors in Glasgow. I think it is more than doubtful whether at the time the deed was arranged for, and ultimately executed, the heiress of entail Mrs Cleland or her husband knew about this partnership, but shortly before their agent was the same gentleman who had acted as agent for their predecessor in the estate, Mrs Barbara Cleland—namely, James Service senior. James Service junior was brought up in his father's office, and became a solicitor in due course, and it was the most natural thing in the world that he should go into his father's business, and if he should associate himself when his father grew old and frail with Mr Morrison, he still continued to do business for the Clelands, clients of his father, as probably he did with other clients, as his father, or he acting for his father, had done before. The client Mrs Cleland was getting old, she had married late, and it is very unlikely that she knew anything of the details of this connection—they were exceedingly uninteresting to her. In point of fact, Mr Service junior, without mentioning any partnership with the present defender, negotiated this feu-contract, and acted as agent without saying to what extent he was interested in the business, or that the matter was between him and his partner; he executed this conveyance—I mean, prepared it as a conveyancer—and though he was undoubtedly interested to the extent of one-half in the matter, I think it is quite clear that he concealed that fact from his client. That the deed was deceitful upon the face of it is clear, for although Service was ostensibly acting as agent, to the extent of one-half he was himself interested in it, and it bears to be in favour of Morrison exclusively. Of course if the client had known at the time that Morrison was her agent, she would necessarily have known that he was interested in the transaction, because the deed was in his favour only. I may repeat what I have already said, that I do not believe she knew of Morrison having any charge of her matters as solicitor, or being in partnership with James Service junior, on whom she necessarily relied to take charge of her interest as her solicitor. But this deed was prepared by one of the partners of this company, the defender being the other, and being in the defender's favour it is deceptive on the face of it. Actually before it is ratified, as Lord Gifford has pointed out, the two partners by a deed between themselves, granted by the one in favour of the other, declared what was the true nature of the purchase. The nature of that disposition by the defender to Service junior is very striking. It is—"considering that although the said conveyance appears to be absolute in my favour, yet I hereby declare that the same is really and truly in trust for behoof of myself and James Service junior, to the extent of an equal half each in the said lands."

Now, why should this feu-contract have borne anything contrary to what was really the fact? The defender has given us no explanation at all. James Service junior, who wrote it, said it was to deceive his father, and certainly it must have deceived the client also, unless she was put on her guard somehow. It bore contrary to the fact in a very material matter, if it be material, as it undoubtedly is, that a solicitor acting as such and pretending to take charge of his client's interests is truly taking the benefit in his own favour, for that is the fact concealed by the deed. The defender was partner with Service in these unusual proceedings. It is said that the client was informed of them, but I have no rational explanation of the proceeding other than the intention to deceive the party to the deed who did not know the fact. I have documentary evidence in the shape of a regularly attested deed which the defender and his partner had executed, and which was known only to themselves, and by which they divided the property, and I have nothing to the effect that the client was informed of the true state of matters, except parole evidence of a very doubtful and suspicious character. I am therefore disposed to conclude that the client was actually deceived in this important matter, and if it were necessary to put the judgment on that ground alone, I think there is sufficient material here for doing it.

But a deed may be unduly obtained by a solicitor from his client in his own favour even though the client knows he is his solicitor and that he is taking benefit by the deed, for it is a rule of law—in England they used to call it a rule of equity, but here we make no distinction—that a solicitor taking a conveyance from his client in his own favour ought to see and take care that the client's interests in the matter are intrusted to another and independent solicitor. That is the general rule

which governs a solicitor's duty, and governs every solicitor's practice who acts properly. You may take a conveyance of a house from your client, but if you do, you ought to see that your client in that particular matter has taken the advice of another and independent agent. Now, though that is the rule, nevertheless it must be taken with this qualification, that though a solicitor shall have taken a conveyance in his own favour from his client, he shall be at liberty to uphold it provided he shall show, the *onus* being upon him, that his client's interests in the matter were as well protected and attended to as if they had been under the charge of another and independent solicitor. Now, regarding this case in that view, I am very clearly of opinion that the defender has not satisfied that *onus*. I am not of opinion upon the evidence here that the interests of the client in this conveyance—whereby a benefit was conferred upon her solicitor—were as well attended to and protected as if under the charge of another and independent solicitor. Upon that ground I am of opinion that this deed ought to be set aside.

With reference to what I observed at the outset, that the record afforded sufficient material to proceed upon, I meant that the record and the evidence taken together enable us to decide in point of fact whether the client's interests were or were not protected by the advice and charge of another and independent solicitor. For that is the issue of fact which is presented on this branch of the case. Now I think the ground of action upon this head is supported by the evidence, and that the answer is not supported, but on the contrary is negatived by it. I think it is right to say that the question does not resolve itself into this, Was a fair price paid or full value given for the benefit which the solicitor obtained? The answer to an inquiry of that kind does not solve the question; it is, Did the agent who took the conveyance to himself from his client see that the client's interests were as well attended to and protected as if another and independent agent had been charged with it? Now I think he did not, and I can upon an *ex post facto* inquiry conjecture what another and independent agent charged with the interest of Mr and Mrs Cleland in the matter in 1876 would have advised them to do. We have some suggestion as to what even old Mr Service would have advised them to do. He would not have advised them to execute such a feu-contract as this. I have a shrewd suspicion that a disinterested and independent solicitor in Glasgow if called upon for advice would not have advised them to execute this feu-contract.

The only other point to be disposed of is—Is there here a title to sue? and upon that I confess I have no doubt at all. It is a gross mistake in law to speak of an heir of entail being a third party in such a matter as this. An heir of entail is a third party with respect to any deed made by or incurred by the preceding heir outwith the entail. If the heir of entail in possession of an estate incurs a personal obligation, the heir of entail succeeding is a third party having no passive title with respect to that; but with respect to the entailed estate and everything relating to the administration of the entailed estate and within the powers of the entail, the heir of entail is the heir and *eadem persona cum defuncto*. It is not doubtful that the next heir takes the benefit from a deed made in the administration of the entailed estate within the powers of the entail. He is not a third party; he succeeds to the whole benefit of the deed, and he succeeds to the lands and titles and draws the rents from the tenants. On the other hand, he is under all the obligations imposed by a deed granted within the powers of the entail. He has both an active and a passive title. He succeeds to the benefit, but he also succeeds to the burden or is subject to the burden, which is just a passive title. If a deed executed within the powers of the entail confers a right upon succeeding heirs at the expense of a third party, the third party could set it aside if there was any ground competent to him, such as fraud; again if the heir of entail is subject to any burdens which if honestly laid would not have been objectionable under the deed of entail, he will surely be entitled to challenge the deed at common law, if there is any ground competent to him, independent of entail law altogether; and that is the case here, and I cannot distinguish between it and the case I put by way of illustration in the course of argument, and which I may repeat again. The solicitor and confidential legal adviser of an heir of entail in possession, who happens to be an old woman, takes a lease of the whole estate for nineteen years in favour of A B, a third party, with a secret deed of trust from A B in favour of himself. He uses his whole influence as agent to obtain a lease of the whole estate from his client, the heir in possession, who is bound to administer the entailed estate with reference to the interest of the whole succeeding heirs. This fraudulent solicitor, upon the argument which has been submitted to us, says—"Oh! I must have the estate for nineteen years; to be sure I acted a fraudulent part. I used my influence as a solicitor to get it in my own favour, concealing that I was taking any benefit off the heir who was to suffer;" and he should have no interest to challenge it. That is extravagant. A title in every case accompanies the only interest. The only instance where you separate the title and interest is where you have the interest in several parties, and it is more expedient or according to legal principle that, with reference to the right to redress a wrong, the title shall be with one party rather than with another. Within the whole range of the law I know of no wrong which can be done where the interest to remedy it, is solely and exclusively in one individual, and not the title.

Upon the whole I entirely concur with your Lordships to the effect you have announced, namely, to the effect of setting aside this feu-contract, and of setting it aside *in toto*—and pronouncing decree of reduction with expenses to the pursuer.

The Court pronounced this interlocutor:—

. . . Sustains the third plea-in-law for the pursuer, and in respect thereof recal the said interlocutor, and reduce, decern, and declare (1) the feu-contract libelled entered into between the late Mrs Marion Cleland of Springfield, spouse of James Cleland of Blairlinn, in the parish of New Monkland, heiress of entail in possession of the entailed lands of Springfield and others, and the defender; (2) judicial ratification of the said feu-contract by the said Mrs Marion Cleland: and

(3) warrant of registration on behalf of the defender, endorsed upon the said feu-contract, and subscribed by James Service junior, writer, Glasgow, to have been from the beginning, to be now, and in all time coming null and void, and of no avail, force, strength, or effect in judgment, or outwith the same in time coming, and repone and restore the pursuer thereagainst *in integrum*; and grant warrant to the Keepers of the General Register of Sasines to mark upon the registers that decree of reduction of the deeds libelled; reserving to the pursuer all claims of count and reckoning against the defender for his intromissions with the rents, profits, and annual produce of the lands libelled from 1st October 1877 to the date hereof, or until his intromissions therewith shall cease: Finds the defender liable in expenses to the pursuer, and remit to the auditor to tax the same and to report, and decern."

Counsel for Pursuer (Reclaimer)—Guthrie Smith—Moncreiff. Agents—Macgregor & Ross, S.S.C.

Counsel for Defender (Respondent)—Dean of Faculty (Fraser.)—Rhind. Agent—George Begg, S.S.C.

Wednesday, November 13.

FIRST DIVISION.

[Sheriff of Forfarshire.

STIVEN *v.* THE HERITORS OF THE PARISH OF KIRRIEMUIR.

Church—Reseating of Area—Competency of Petition for Allocation of Seats.

The seats of a parish church had been allocated in 1795 by decreet-arbitral after a submission to the Sheriff, and, *inter alia*, thirty-nine seats had been apportioned to the feuars. The church having been repaired and reseated, but without altering the extent of the accommodation, a petition was brought in the Sheriff Court by a single feuar praying the Court to divide the area of new. *Held* that a petition for such a purpose was incompetent.

In 1795 the area of the parish church of Kirriemuir was divided amongst the heritors of the parish under decreet-arbitral issued by Peter Ranken, Sheriff-Substitute of Forfarshire, the arbiter chosen in a submission amongst the whole heritors of the parish. This decreet-arbitral was implemented and carried into effect, and the arrangement and division so made was uniformly adhered to, until some years before the date of this petition, when certain alterations and repairs were executed on the church, including its reseating. An organ was also introduced, which, however, did not, it was conceded, diminish the accommodation, as the gallery in which it was placed was enlarged.

This was a petition by John Stiven, a proprietor of certain lands in the parish, praying the Court "to divide the area of the parish church of Kirriemuir, and allocate the sittings therein amongst the parties entitled thereto in terms of law, after intimation being given to the heritors and minister of said parish, and other parties interested, in such manner as the Court may direct," &c. The averment in the pursuer's condescendence was that the "heritors, though called upon, have refused or delayed to obtain a judicial division of the area of said church, or a division by agreement or otherwise."

Process was sisted in the Sheriff Court to enable the defenders to lodge a scheme of allocation of the seats. This was done "in accordance with the decree-arbitral of 1795." Under the scheme lodged in process, the feuars, of whom the petitioner was one, were still found entitled to the same number of sittings as before—thirty-nine in number. The petitioner afterwards lodged objections to the scheme to the effect that the seats had not been distributed amongst the feuars.

The Sheriff-Substitute (Robertson), who had pronounced his interlocutor before the sist was granted or the scheme of allocation had been lodged, had allowed a proof; and on appeal, the Sheriff (Maitland Heriot), after the procedure referred to above, had dismissed the petition.

The pursuer appealed to the Court of Session.

Authorities—*Magistrates of Hamilton* v. *Duke of Hamilton*, June 23, 1846, 8 D. 844, 22 Jurist 266; *Duke of Roxburghe and Others* v. *Millar*, June 1, 1876, 3 R. 728, 4 R. (H. of L.) 76; *Duke of Abercorn* v. *Presbytery of Edinburgh*, March 17, 1870, 8 Macph. 733.

At advising—

Lord President—I do not think that in this case there are any material facts in dispute. It is not denied that in 1795, under a submission by all the heritors, the area of this church was divided by decreet-arbitral—a perfectly competent mode—nor that this decreet-arbitral was acted upon, and that possession was held under it until a recent date, when certain alterations were carried out. One of the pursuer's allegations upon record is, that there was a great diminution in the accommodation in the church by the introduction of an organ at that time. That was, however, not insisted in, as the diminution was met by an increase in the gallery itself, and there are now as many seats as formerly. But then it is further alleged, that when the area of the church was reseated the seats were made wider and more comfortable, and that in that way the number was diminished. I do not find anything else in the condescendence in support of the averment that the extent of the accommodation was decreased.

The prayer of the petition is that the area should be divided. In short, the application made to the Sheriff is to divide the area of this church on the same footing as if it had been a church newly erected. Now, I always understood that it was settled both in law and by practice, that the division of a church, when once settled in a competent way, cannot be disturbed so long as the structure remains; but that when a new church is erected there is an application to the Sheriff to divide it simply according to the heritors' legal rights, without regard to their respective shares in the area of the old church. These are very different things, and the distinction is noted in the case of *The Duke of Roxburghe and Others* v. *Millar* both here and in the House of Lords.